83 - 1670

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

AMERICAN MOTORS CORPORATION,

Petitioner,

v.

SAMUEL C. HANNA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE TOLLING OF BACKPAY LIABILITY AND MITIGATION OF DAMAGES PRINCIPLES OF *FORD MOTOR CO. V. EEOC*, 458 U.S. 219 (1982) (A TITLE VII CASE), APPLY TO A CLAIM FOR BACKPAY UNDER THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT OF 1974, 38 U.S.C. §§ 2021-2026, WHEN THE RETURNING SERVICEMAN INITIALLY ACCEPTS, BUT LATER REJECTS, EMPLOYMENT IN HIS PRE-SERVICE POSITION WITHOUT PRE-SERVICE SENORITY.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner American Motors Corporation ("AMC")[1] petitions this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this action on January 9, 1984.

OPINIONS BELOW

The opinion of the court of appeals is reported at 724 F.2d 1300 (7th Cir. 1984), and is reproduced in the Appendix to this Petition at A-2.

The memorandum decision and order of the District Court for the Eastern District of Wisconsin, dated October 27, 1982, is

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[1] AMC states pursuant to Rule 28.1 that it has no parent company and no subsidiary or affiliate whose stock is publicly traded.

reported at 113 L.R.R.M. (B.N.A.) 2945 (E.D. Wis. 1982), and is reproduced in the Appendix at A-27.

A prior opinion of the court of appeals, dated January 5, 1981, is unpublished and is reproduced in the Appendix at A-34. Another prior opinion of the court of appeals in this action, dated June 23, 1977, is reported at 557 F.2d 118 (7th Cir. 1977), and is reproduced in the Appendix at A-43.

Prior opinions of the district court in this action, dated February 6, 1979 and May 19, 1976, are unpublished and reproduced in the Appendix at A-41 and A-51, respectively.

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its decision and entered judgment on January 9, 1984. The court of appeals entered an order denying AMC's Motion for Leave to File an Untimely Rehearing Petition on March 5, 1984. This Petition is filed within ninety days of January 9, 1984.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a writ of certiorari to review the court of appeals' decision and judgment.

STATUTE INVOLVED

This action was brought under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2022 (1976), which is reproduced in the Appendix at A-1.

STATEMENT OF THE CASE

A. Procedural Background

This case involves a claim by a veteran seeking job reinstatement and backpay. Respondent Samuel C. Hanna began this action in 1975 under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("Veterans' Act"), 38 U.S.C. § 2022, which also grants the district court jurisdiction to hear the case.

This litigation proceeded in two stages. In the first stage, the issue was whether Hanna met the criteria for reemployment rights under the Veterans' Act. The district court granted AMC's motion for summary judgment on the grounds that Hanna had no reemployment rights under the Veterans' Act because he had been a temporary employee not covered by the Veterans' Act. *See* 38 U.S.C. § 2021(a). The court of appeals reversed, holding that Hanna was entitled to be treated as a permanent employee, ordering that Hanna be reinstated with seniority from the date of his pre-service hire, and remanding for trial on the issue of backpay liability.

In the second stage of the litigation,[2] the district court awarded Hanna backpay, rejecting AMC's argument that *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), applied to reduce Hanna's damages since Hanna had initially accepted and later rejected AMC's offer of a job without pre-service seniority. The district court, however, reduced the amount of the award by 70% for a period when Hanna had attended school full time, because his "full time schooling interfered with his duty to mitigate his damages." (App. at A-32.)

Hanna appealed and AMC cross-appealed from the backpay determination. The court of appeals affirmed on AMC's cross-appeal, holding that *Ford Motor Co. v. EEOC* did not apply to this Veterans' Act case. On Hanna's appeal, the court of appeals reversed, holding that the backpay damages should not have been reduced.

AMC challenges only the holding regarding *Ford Motor Co. v. EEOC*.

B. Facts

Hanna was first hired by AMC on September 14, 1970. He attached bolts, bumper guards, and brake hoses to automobiles as they moved along an assembly line. He earned approximately $3.75 per hour.

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[2]Following the remand, the district court dismissed Hanna's action under Fed. R. Civ. P. 41(b) for failure to comply with the court's pretrial orders. Hanna appealed and the court of appeals reversed in an unpublished order. App. at A-41, A-34.

Under the applicable collective bargaining agreement, a new worker remained on probationary status until he completed 60 days of work, which must be done within one year. Hanna worked for AMC until December 18, 1970, at which time he was laid off as part of a general reduction in work force. At the time of his layoff, Hanna had worked only 56 days and was therefore still a probationary employee. By September 16, 1971, AMC had not recalled Hanna to work and therefore notified him that his employment was terminated because he had not completed the probationary period within the one year requirement.

Hanna was inducted into the military on March 10, 1971, while he was still on layoff status.

After Hanna's discharge from the armed forces on February 22, 1973, he sought reemployment with AMC. AMC thought Hanna had no statutory right to reemployment because he had not completed his 60 days of probationary work as required by the collective bargaining agreement and therefore had not held a position "other than a temporary position." *See* Veterans' Act, 38 U.S.C. § 2021(a).[3] Although AMC told Hanna that he had no reemployment rights, AMC offered to employ Hanna as a "new hire."

Hanna accepted AMC's offer and began working on March 22, 1973. His job was similar to the one he had in 1970 and involved attaching parts to automobiles on an assembly line. His hourly wage was higher in 1973 than it had been in 1970.

One month later, however, on April 23, 1973, Hanna complained that AMC was violating his Veterans' Act rights by refusing to treat him as a "returning" employee. When AMC repeated

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[3]In stage one of the litigation, the court of appeals held that AMC should have credited Hanna with four days on which he had been absent due to preinduction physicals. With the additional four days, Hanna would have completed his 60 days of probationary employment, would have had seniority measured from his date of hire, and would have reemployment rights under the Veterans' Act. The court of appeals ordered Hanna reinstated and remanded for determination of the backpay award. App. at A-43.

its position that Hanna did not come within the statutory criteria for reemployment with seniority, Hanna walked out of the plant with the intention of quitting and was terminated by AMC.

This action was commenced on January 16, 1975, by the United States Attorney on Hanna's behalf.

C. Opinions Below

AMC argued in both the district court and the court of appeals that *Ford Motor Co. v. EEOC* should apply to toll AMC's backpay liability from the time AMC reemployed Hanna in March 1973, even though AMC's job offer did not include pre-service seniority. The district court summarily rejected AMC's *Ford Motor* argument. (App. at A-31.)

On appeal, the Court of Appeals for the Seventh Circuit likewise summarily rejected AMC's argument. The court of appeals distinguished *Ford Motor Co. v. EEOC* because it was a Title VII case, not a Veterans' Act case, and because to apply *Ford Motor Co. v. EEOC* "would not only demean the veteran's service to his country, but would also promote unlawful activity . . . ." (App. at A-25.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT AND DISREGARDS THIS COURT'S INSTRUCTION TO SIMPLIFY EMPLOYMENT LITIGATION.

This Court's recent simplification of employment litigation should not be abrogated by subordinate court decisions. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), encourages employers voluntarily to hire job discrimination claimants and greatly simplifies employment litigation by removing the complex mitigation of damages issue from the case once a job offer is made.

The court of appeals inexplicably restricted *Ford Motor* because it was a Title VII case, holding that it has no application

to analogous facts under a different employment rights statute. This Court should act now before other courts similarly and needlessly complicate employment litigation.

Ford Motor held that an employer's backpay liability is tolled as of the date he unconditionally offers the Title VII claimant the job he originally sought but was denied. This rule benefits the claimant by getting him to work, benefits the employer by limiting his backpay liability, and simplifies the adjudication of Title VII litigation by eliminating the mitigation issue.

Even though the benefits of the *Ford Motor* rule are unquestioned, and even though all the justifications for the rule are applicable in the instant case, the court of appeals summarily refused to apply *Ford Motor*. The court of appeals gave the enigmatic reasoning that application of *Ford Motor* to a case arising under the Veteran's Act would not only "demean the veteran's service to his country," but would also "promote unlawful activity." (App. at A-25.)

The *Ford Motor* rule would no more demean a veteran's service than it would insult the race of a Title VII claimant. It would no more promote unlawful activity under the Veteran's Act than it would promote violations of Title VII. The court of appeals does not distinguish *Ford Motor* — it rejects it.

Moreover, the course of this litigation proves the need for the *Ford Motor* rule. This dispute began in 1973 when Hanna refused AMC's unconditional job offer because it did not include full seniority.[4] Four years passed before Hanna received court-ordered reinstatement, and the mitigation issue was still to be resolved. Litigating the mitigation issue consumed considerable resources during pretrial discovery, trial to the district court, and another full appeal to the court of appeals, which made its final decision on January 9, 1984 — nearly eleven years after this dispute began.

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[4]Initially, the district court upheld AMC's position that respondent had no recall rights and no reemployment rights under the Veterans' Act. App. at A-51.

Had the rule adopted in *Ford Motor* been applied from the outset of this case, Hanna either would have accepted the job offer in 1973, or would have waived backpay rights thereafter. In either event, Hanna's dispute with AMC would then have been narrowed to his seniority rights — a far simpler problem involving a question of law. The dispute might have been resolved more than six years ago, at the first of three court of appeals' decisions.

Applying *Ford Motor* beyond mere Title VII context is further dictated by the fact that Title VII, the Veteran's Act, and other employment rights statutes derive their rules on backpay rights and mitigation of damages from the same common law source and should be interpreted harmoniously. When this Court described the requirement that a claimant mitigate his damages,[3] it referenced not only common law, but also law developed under the National Labor Relations Act. *See* 458 U.S. at 231 n. 15. Further, in another

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[3]The Court recognized that the Title VII claimant had a statutory duty to mitigate damages. "This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.

"An employer's unconditional offer of the job originally sought to an unemployed or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective, lest a defendant's offer be irrationally disfavored relative to other employers' offers of substantially similar jobs. The claimant, after all, plainly would be required to minimize his damages by accepting another employer's offer even though it failed to grant the benefits of seniority not yet earned. Of course, if the claimant fulfills the requirement that he minimize damages by accepting the defendant's unconditional offer, he remains entitled to full compensation if he wins his case. The court may grant him backpay accrual prior to the effective date of the offer, retroactive seniority, and compensation for any losses suffered as a result of his lesser seniority before the court's judgment.

"In short, the unemployed or underemployed claimant's statutory obligation to minimize damages requires him to accept an unconditional offer of the job originally sought, even without retroactive seniority. . . ." *Ford Motor*, 458 U.S. at 231-234 (footnotes omitted).

Title VII case, this court relied on two cases arising under earlier versions of the Veteran's Act as authority for granting retroactive seniority. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976).[6]

The court of appeals' decision threatens the advance begun in *Ford Motor*. This Court should act now to reaffirm the need to simplify employment litigation. If the Court lets this opportunity slip away, other lower courts will similarly misread *Ford Motor* and employment litigation will be needlessly complicated and prolonged.

II. THE COURT OF APPEALS' FAILURE TO CONSIDER ADEQUATELY *FORD MOTOR*, AS DEMONSTRATED BY ITS INCONSISTENT TREATMENT OF TITLE VII PRECEDENTS, CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

It is a first principle of appellate decision making that a court must give reasoned justifications for the result it reaches. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959) ("the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."). Indeed, it is this principle which distinguishes our legal system from one that simply relies on judges' intuitions. *See* P. Brest, *Processes of Constitutional Decisionmaking* 1089 (1975) (quoting a hypothetical dialogue in which a judge explains a case's result as follows: "The justification for this decision rests upon the fact that I have intuited this result to be the best possible one for this case.")

The court below, however, did not adhere to the principle of reasoned justification when it decided not to follow *Ford Motor Co. v. EEOC*. Instead, it just asserted that *Ford Motor* was a Title

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[6] In Age Discrimination in Employment Act cases, too, the courts have relied on race and sex discrimination and unfair labor practice cases as models for dealing with the tolling of backpay periods through job offers. *See, e.g., Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281-83 (8th Cir. 1983).

VII case, not a Veterans' Act case, and that applying *Ford Motor* to a Veterans Act case would "demean the veteran's service to his country" and would "promote unlawful activity." The court of appeals did not at all consider the reasoning of this Court in *Ford Motor*, nor did it explain why that reasoning was not as equally applicable to a returning veteran as to a Title VII claimant.

The court of appeals' refusal to apply *Ford Motor* on the basis that it was a Title VII case is all the more confusing because the court of appeals expressly adopted Title VII standards in another part of its opinion, pointing to "the factual similarity of an employment discrimination case and a case arising under the Vietnam Veterans' Readjustment Act . . . ." (App. at A-14.)

This Court should grant certiorari in this case to reaffirm appellate courts' responsibility to justify, and not merely announce, their results.

III. THIS COURT SHOULD REQUIRE THE COURT BELOW TO RECONSIDER ITS REFUSAL TO APPLY FORD MOTOR

If this Court should decline to grant in this forum full argument and briefing of the conflict between *Ford Motor* and the opinion below, then it should nevertheless vacate the judgment and remand the case for further consideration by the court of appeals.

Since this Court can decide only a limited number of cases, it must rely on the lower courts to consider carefully these cases and apply them. The cavalier treatment of this Court's ruling in *Ford Motor* merits some response. An order vacating and remanding either for determination in accord with *Ford Motor* or for reconsideration of *Ford Motor* would be an appropriate exercise of this Court's supervisory authority.

A common occasion for orders vacating and remanding arises when this Court has decided a relevant case after the court below had acted. *See* R. Stern & E. Gressman, *Supreme Court Practice* 362-63 (5th ed. 1978). In such a situation, the lower court takes a second look at the case, this time with the added guidance of the intervening Supreme Court ruling.

The same principle should apply where, as here, the lower court had a Supreme Court ruling available to it that should have guided its decision but did not. Given the limited attention the court below paid to *Ford Motor*, it was as if this Court had not even spoken on the backpay tolling issue.

Therefore, if this Court should not select this case for full argument and briefing, it should nevertheless exercise its supervisory authority and remand either for determination in accord with *Ford Motor* or for reconsideration of *Ford Motor*.

CONCLUSION

Ford Motor established a rule of law that will simplify and shorten employment litigation. Complicated and protracted litigation serves no one's interest, certainly not the job claimant's.

This Court should grant the writ of certiorari so that the rule of *Ford Motor* and its effort to simplify litigation are not ignored by the lower courts.

Respectfully submitted,

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Dated: April 8, 1984

APPENDIX

§ 2022. ENFORCEMENT PROCEDURES

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOS. 82-2931 & 82-2980
SAMUEL C. HANNA,

Plaintiff-Appellant,
Cross-Appellee,

v.

AMERICAN MOTORS CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 75 C 27 — Terence T. Evans, *Judge.*

ARGUED JUNE 2, 1983 — DECIDED JANUARY 9, 1984

Before BAUER and COFFEY, *Circuit Judges*, and CELEBREZZE, *Senior Circuit Judge.**

COFFEY, *Circuit Judge.* Appellant, cross-appellee, Samuel Hanna, appeals the judgment of the United States District Court for the Eastern District of Wisconsin, awarding him lost wages in the amount of $1,100.74 for the period between December 18, 1970, and February 28, 1971, lost wages in the amount of $8,671.50

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*The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

for the period between April 24, 1973, and November 14, 1977, and interest in the amount of $408.00. Cross-appellant, American Motors Corp., appeals the district court's ruling that *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), is inapplicable to this case which arises under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (prior to 1982 amendment), 38 U.S.C. § 2021 *et seq.* (1976). We reverse the judgment of the district court as to the award of $8,671.50, and award appellant $28,905.00, plus prejudgment interest in the amount of $15,347.56, for the period between April 24, 1973, and November 14, 1977. In addition, we award the appellant prejudgment interest in the amount of $487.97 on the $1,100.74 in lost wages awarded by the district court for the period between December 18, 1970, and February 28, 1971.

I

This court has considered appellant Samuel Hanna's complaint against American Motors Corporation ("AMC") on two prior occasions.[1] We initially set out the underlying facts in *Hanna v. American Motors Corp.*, 557 F.2d 118 (7th Cir. 1977)("*Hanna I*"), thus, for the purpose of this appeal we will only summarily review the facts pertinent to this decision.

On September 14, 1970, Hanna commenced work as an assemblyman at AMC's Kenosha, Wisconsin plant. Hanna earned "approximately $3.75 an hour" attaching bolts, bumper guards,

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[1]The case orginiated in January 1975, when the Department of Justice, on behalf of Hanna, filed suit in the United States District Court for the Eastern District of Wisconsin, claiming that AMC had violated Hanna's rights under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 *et seq.* (1976). In May 1976, the district court granted AMC's motion for summary judgment and dismissed the case. In June 1977, this court held that AMC had, in fact, violated 38 U.S.C. § 2021 et seq. (1976), thus reversing the district court's judgment and remanding the case. See *Hanna v. American Motors Corp.*, 557 F.2d 118 (7th Cir. 1977). In February 1979, the district court dismissed the case pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. In January 1981, this court, in an unpublished order, reversed the district court's dismissal and remanded the case for determination of damages. In October 1982, Hanna, acting through private counsel, proceeded to trial on the issue of damages in the United States District Court for the Eastern District of Wisconsin.

and brake hoses to automobiles as they moved along an assembly line. On September 17, 1970, and December 3, 4, and 7, 1970, Hanna absented himself from work in order to undergo a mandatory military service preinduction physical examination. On all four of these days work was available for Hanna at the AMC plant in Kenosha. On December 18, 1970, AMC reduced its labor force and "laid off" Hanna, who up until that date had worked fifty-six days. Pursuant to the collective bargaining agreement between AMC and the United Auto Workers Union ("UAW"), of which Hanna was a member, if Hanna had worked sixty days, he would have completed his probationary period and would have been awarded seniority from September 14, 1970, the date of his original hiring. In addition, if Hanna had attained seniority status on or before December 18, 1970, he would not have been "laid off" until February 28, 1971.

On March 10, 1971, Hanna was inducted into the Armed Forces and while in military service he received a letter from AMC stating that because he had failed to complete his sixty-day probationary period within one year, as provided for in the UAW-AMC collective bargaining agreement, his employment at AMC had been terminated. Following almost two years of military service, including a nine-month stay in Vietnam, Hanna received an honorable discharge from the Armed Forces on February 22, 1973.

Upon returning to Kenosha, Wisconsin, Hanna contacted AMC about being reinstated to his previous job but was told by company officials that he had no reemployment rights. On March 22, 1973, AMC agreed to employ Hanna as a "new hire" performing "similar work" on the assembly line. On April 23, 1973, Hanna complained to AMC officials that they were violating his veteran's reemployment rights by refusing to accord him seniority from the date of his original hiring on September 14, 1970. Due to AMC's refusal to grant seniority, Hanna left AMC the following day and was terminated by the company.

Hanna sought the assistance of his union, contacting UAW board members in an attempt to obtain reinstatement with seniority

at AMC, but his efforts "didn't develop into anything." [2] Hanna next contacted the Department of Labor who, in turn, transferred the matter to the Department of Justice, who filed suit, on behalf of Hanna, against AMC claiming that the company had violated Hanna's rights under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (prior to 1982 amendment), 38 U.S.C. § 2021 *et seq.* (1976) ("Vietnam Veterans' Readjustment Act"). The district court granted AMC's motion for summary judgment and dismissed the case. The Government appealed and this court ruled that:

> "But for the pre-induction physicals, plaintiff would have collected his salary until February 28, 1971, and would have been reinstated upon return from active duty with a September 14, 1970, date with all attendant rights under the collective bargaining agreement. Thus under the Act plaintiff is entitled to reinstatement with a September 14, 1970, seniority date and to collect lost wages from December 18, 1970, until at least February 28, 1971, his proper lay off date.[3] 38 U.S.C. § 2022, *United States ex rel. Adams v. General Motors Corp.*, [525 F.2d 161 (6th Cir. 1975)]. Plaintiff did not waive his rights under the Act by his April 24, 1973, refusal to continue in the inferior status accorded him by the defendant. *O'Mara v. Petersen Sand & Gravel Co.*, 498 F.2d 896 (7th Cir. 1974).
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> Accordingly the district court's judgment is reversed and remanded for further proceedings consistent herewith.
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> [3]He will also be entitled to recover lost wages from April 24, 1973, when he left defendant's employ, to date unless on remand defendant can show that plaintiff abandoned his willingness to continue in its employ under the conditions mandated by the Act when he enrolled

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[2]The record fails to indicate what action, if any, was taken by UAW board members after they were contacted by Hanna.

> in the University of Wisconsin-Parkside in September, 1973 as a student seeking a degree. See *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267-268 (10th Cir. 1975)."

Hanna I, 557 F.2d at 122.

At the subsequent trial for damages, which is the subject of this appeal, the evidence revealed that following his termination date of April 24, 1973, Hanna visited the Kenosha Job Service office four times a month between June and September of 1973. A Job Service representative gave Hanna "five to ten" referrals which "didn't pan out to anything." On September 4, 1973, Hanna enrolled as a full-time. day student at the University of Wisconsin-Parkside ("UW-Parkside") in Kenosha, Wisconsin and thus began receiving veterans benefits under the "G.I. bill." UW-Parkside is "mainly a commuter school," that is attended in significant part (31%) by students over thirty years of age, "a number of" whom are employed full time. During the fall semester of 1973, Hanna filed "five to ten" applications with various employers and continued to visit the Kenosha Job Service office.

Between January 1974 and the "summer" of 1974, Hanna did not attend school but continued to follow up on referrals from the Kenosha Job Service office, though "nothing panned out." In the "summer" of 1974, through a friend's suggestion, Hanna landed a seasonal job as a general laborer, cutting grass and painting fences, for the Wisconsin Natural Gas Company in Racine, Wisconsin. Hanna continued at this job for "about a month," earning $598.00, and then quit because he "felt that as a Vietnam veteran [he] should be doing something more. . . ." Hanna testified that in September of 1974, he returned to UW-Parkside as a full-time day student because he "didn't have a job . . . and it was a means of getting some money and income and plus learning something." Between September 1974 and June 1975, Hanna filed applications at two factories in Waukegan, Illinois and one in Kenosha, Wisconsin. During this period Hanna also continued to visit the Kenosha Job Service office, and remained "ready, willing, and available to work at American Motors Corporation," or at any factory with com-

parable employment opportunities.[3] Even though Hanna did not file any application with "private employment services" during this period, he did continue to read the want-ads of the Kenosha News and drive his automobile to various factories in order to personally file job applications.

Hanna was unable to find employment during the "summer" of 1975, and in September he again enrolled in UW-Parkside as a full-time, day student. The testimony revealed that during the fall semester of 1975, Hanna "continued to seek full-time employment," but was unsuccessful in his efforts. Between February 1976 and January 1977, Hanna, while still attending school, filed additional employment applications at factories located in Waukegan, Illinois, Zion, Illinois, and Kenosha, Wisconsin but was offered no job. Hanna left school after the fall semester of 1976. In June 1977, after having had an application on file with the Kenosha Job Service for over four years, he obtained his first employment through the Job Service office in the "CETA" program, building campsites for the Kenosha City Parks Commission. Hanna worked at this job for "about two months" earning $1,312.00, and terminated his employment when the Government informed him of this court's decision in *Hanna I*. Following the decision in *Hanna I* on June 23, 1977, the district court issued two reinstatement orders before AMC complied and reinstated Hanna as an assemblyman, earning $4.25 an hour, on November 14, 1977. Hanna continued at this job for seven months until he was again discharged by AMC.

At the trial for damages, Kenneth Neill, supervisor of the Kenosha Job Service program, testified that his agency "counseled with a number of veterans" between April 24, 1973, and November 14, 1977, because the agency was "mandated by law to serve and provide priority [to] veterans," in order to help them readjust to society and overcome any effects of the then referred to "Vietnam Vet Syndrome." Neill further testified that there were

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[3]The evidence revealed that at some time between April 24, 1973, and November 14, 1977, Hanna worked for a single day at Morelli's Overseas Export Company, but left because the "loading and unloading of hundred pound boxes" was "much too difficult."

five other "transportation equipment" plants in the area surrounding Kenosha but that AMC generally paid twenty to twenty-five percent more than the other employers. Neill concluded that there was "a high probability that a person [of general factory worker skills] would not be able to find a job comparable," to that of an AMC employee and that the closest comparable employer was the General Motors Corporation, some seventy miles away in Janesville, Wisconsin. In addition, the unemployment rate in Kenosha County ranged from 3.5 percent in 1973 to 8.5 percent in 1977, and the unemployment rate for a minority, such as Hanna, was "usually double" that of non-minorities. On cross-examination Neill initially stated that between April 24, 1973, and November 14, 1977, an individual with skills commensurate with Hanna's "could secure employment . . . within a twenty-seven mile commuting area" of Kenosha. Neill then qualified that statement on redirect examination and admitted that the probability of finding "comparable" employment was "substantially lower" and, in fact, within the same twenty-seven mile radius, there was "*no comparable employment to American Motors when all factors [were] concerned* [sic]." (emphasis added). Based upon this testimony, the trial judge ruled, in pertinent part:

> "*I further find that the plaintiff did not abandon his willingness to return to work by becoming a student at UW-Parkside in September of 1973. I believe his decision to return to school can more accurately be characterized as pursuing an alternative that was better than anything else Mr. Hanna had going for him at the moment. Had he been offered a job at AMC with the correct seniority date, I find that he would have either quit school and returned to the job or would have restructured his school courses so that he could return to full time employment while still remaining a student.*
>
> *I do find, however, that Mr. Hanna's full time schooling interfered with his duty to mitigate his damages.* Although he did secure some employment, it was of a seasonal nature, consistent with the kind of job that college students secure while continuing their educations.

Furthermore, I find that work of a somewhat comparable nature to the unskilled labor performed by Mr. Hanna at AMC was available in the Kenosha area in which Mr. Hanna lived during the period in question. Although it might have been difficult to find an unskilled laborer's job that paid as handsomely as did the one at AMC, Mr. Hanna nevertheless should have more diligently pursued work that was available. Thus, I find that to a significant extent, AMC has demonstrated that Mr. Hanna has failed to properly mitigate his damages.

I find no failure of a duty to mitigate between December 18, 1970 and February 28, 1971. Thus, during that period, I find that $1,100.74 is an appropriate amount to be awarded to the plaintiff. As to the remaining claim for $28,905.00, *I find that a reduction should be made for failure to mitigate, the most important element of which was the plaintiff's enrollment for almost three years as a full time college student. Although, as I have said, I do not view his act as a waiver of his right to seek reinstatement at AMC, I believe it significantly cooled his ardor for job hunting.* I believe a 70% reduction for failure to mitigate on this point is appropriate, and thus I award the plaintiff $8,671.50 for post-April 1973 damages. On the December 18, 1970 to February 28, 1971 award of $1,100.74, I believe a further award of post-judgment interest from June 23, 1977 (the date of the decision in Hanna I) to date is appropriate. Because of the closeness of the liability question and the good faith of AMC in reasonably construing its collective bargaining agreement with the UAW (in other words, I do not in any way view this case as one where AMC blatantly disregarded the rights of a veteran), I will not award interest on the damages found to be due for the period of time that followed April 24, 1973." (emphasis added).

On appeal, Hanna contends that:

A. The district court exceeded the directive of this court in *Hanna I.*
B. The district court erred in finding that Hanna failed to mitigate damages.
C. The district court erred in not awarding Hanna prejudgment interest.

On cross-appeal, AMC contends that:

D. The United States Supreme Court's decision in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), precludes Hanna from recovering lost wages for the period between April 24, 1973, and November 14, 1977.

We shall consider these issues individually.

II

A. *HANNA I*

The appellant intially contends that this court's language in footnote 2 of *Hanna I* required the district court, on remand, to compensate Hanna with full lost wages from April 24, 1973, to November 14, 1977, if AMC failed to show that Hanna "abandoned his willingness" to continue in AMC's employ when he enrolled in UW-Parkside. In footnote 2 of *Hanna* I this court stated:

> "[Hanna is] entitled to recover lost wages from April 24, 1973, when he left [AMC's] employ, to date unless on remand [AMC] can show that [Hanna] abandoned his willingness to continue in its employ under the conditions mandated by the [Veterans' Reemployment Rights] Act when he enrolled in the University of Wisconsin-Parkside in September 1973 as a student seeking a degree."

557 F.2d at 122 no. 2. The appellant reasons that he should have been fully compensated for the wages lost during this period because the district court explicitly found that Hanna "did not abandon his willingness to return to work by becoming a student at UW-Parkside in September of 1973."

In construing this court's language in footnote 2 of *Hanna I*, it is important to note that we used the words "entitled to recover lost wages" based upon our interpretation of 38 U.S.C. § 2022 (1976), which provides:

> "If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, *shall have the power*, upon the the filing of a motion, petition, or other appropriate pleading by the person *entitled to the benefits of such provisions*, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. . . . " (emphasis added).

In *Hanna I* this court determined that AMC had failed to comply with 38 U.S.C. § 2021 (1976), and that pursuant to 38 U.S.C. § 2022 (1976), unless the trial court found that Hanna had abandoned his willingness to return to AMC's employ, Hanna was *entitled* to wages he lost as a result of AMC's non-compliance.

Title 38 U.S.C. § 2022 (1976) also provides, however, that the district court "shall have the power" to compensate an entitled employee with lost wages. Contrary to the appellant's position, the statute does not mandate the district court to compensate an entitled employee, rather it only affords the district court the power to do so. In *Levine v. Berman*, 178 F.2d 440 (7th Cir. 1949) ("*Levine*"), this court interpreted section 8 of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 308 (1946), the

predecessor to 38 U.S.C. § 2021 *et seq.*,[4] which provided in pertinent part:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) . . . the district court of the United States . . . *shall have power*, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, *to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.*" (emphasis added).

178 F.2d at 444. We held in *Levine* that the phrase "shall have power," in the context of a veterans' reemployment statute, affords the district court discretion to compensate an entitled employee. *Id.* at 445. *Accord O'Mara v. Petersen Sand & Gravel Co.*, 498 F.2d 896, 898 (7th Cir. 1974). In this instance, the district court awarded Hanna lost wages but reduced the award based upon its finding that Hanna failed to mitigate damages. The district court's actions were within its discretionary power to award damages under 38 U.S.C. § 2022 (1976). *See id.* We next consider whether the

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[4]As this court stated in *Hanna I*:

> "The original statute establishing veterans' reemployment rights was the Selective Training and Service Act of 1940, 54 Stat. 885. The name of the Act was changed in 1948 to the Selective Service Act of 1948, 62 Stat. 604, and again in 1951 to Universal Military Training and Service Act, 65 Stat. 75. In 1967 the Act was renamed the Military Selective Service Act of 1967, 81 Stat. 100, and in 1971 the name was changed to Military Selective Service Act, 85 Stat. 348, and found at 50 U.S.C. App. § 459. The reemployment provisions of the Military Selective Service Act were codified if 1974 with nonsubstantive wording changes in the Vietnam Veterans' Readjustment Act of 1974, 88 Stat. 1578, 38 U.S.C. § 2021 *et seq.* The reemployment provision of the various Acts are substantially identical. Thus the judicial precedents developed under them are largely interchangeable."

557 F.2d at 119 n.1.

district court abused its discretionary power by finding that Hanna failed to mitigate damages.

B. *FAILURE TO MITIGATE*

The appellant contends that AMC failed to meet its burden of proof on the affirmative defense of mitigation, and thus, the district court erred in finding that "to a significant extent, AMC has demonstrated that Mr. Hanna has failed to properly mitigate his damages." To support this contention, the appellant notes that AMC, without calling any of its own witnesses at the trial for damages, simply introduced Hanna's UW-Parkside student transcript and cross-examined Hanna's witnesses in an attempt to prove that Hanna failed to mitigate damages.

This court has, in the past, recognized the duty of an employee, who returns from military service and is wrongfully denied employment by his previous employer, to mitigate damages. In *Levine* we interpreted section 8 of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 308 (1946), the predecessor to 38 U.S.C. § 2021 et seq.,[3] and stated, "[u]nder the general rule of damages, where one is injured or damaged by the wrongful act of another, he is bound to exercise reasonable care and diligence in mitigating the resulting damage. . . ." 178 F.2d at 444 (citing *Van Doren v. Van Doren Laundry Service*, 68 F. Supp. 938, 941 (D.C.N.J. 1946)). *See also O'Mara v. Petersen Sand & Gravel Co.*, 498 F.2d at 897-98; *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d 365, 368 (5th Cir. 1971); *Loeb v. Kivo*, 169 F.2d 346, 350 (2nd Cir. 1948). More recently, in *Peel v. Florida Department of Transportation*, 500 F. Supp. 526 (N.D. Fla. 1980), the United States District Court for the Northern District of Florida applied this "mitigation of damages" principle standard to the Vietnam Veterans' Readjustment Act. *See also Chaltry v. Ollie's Idea, Inc.*, 546 F. Supp. 44, 52 (W.D. Mich. 1982).

We further note that in the area of employment discrimination, when employees seek lost wages for the period of discrimination, this court requires the employee to initially establish the

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[3] *See* footnote 4.

amount of damages. The burden then shifts to the employer to prove, as an affirmative defense, that the employee failed to mitigate those damages. As we stated in *Sprogis v. United Airlines, Inc.*, 517 F.2d 387 (7th Cir. 1975) ("*Sprogis*"), "once the plaintiff has proven [his] case and established what [he] contends to be [his] damages, the burden of going forward to mitigate the liability, or, to rebut the damage claim, rests with the defendant." 517 F.2d at 392. In order to satisfy its burden of proof, the employer must show that:

> "(1) the plaintiff *failed to exercise reasonable diligence* to mitigate his damages, and
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> (2) there was a reasonable likelihood that the plaintiff might have found *comparable work by exercising reasonable diligence*." (emphasis added).

Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 159 (7th Cir. 1981). *See also Jackson v. Shell Oil Corp.*, 702 F.2d 197, 202 (9th Cir. 1983); *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir. 1975); *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 107-08 (7th Cir.), cert. denied, 419 U.S. 834 (1974). Due to the factual similarity of an employment discrimination case and a case arising under the Vietnam Veterans' Readjustment Act, we apply the two-pronged mitigation test in this instance.[6] *See, e.g., Peel v. Florida Department of Transportation*, 500 F. Supp. at 528.

According to the first prong of the test, once Hanna established the amount of his damages, AMC was required to raise mitigation as an affirmative defense and demonstrate that Hanna failed to exercise "reasonable diligence" in obtaining comparable employ-

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[6]In an employment discrimination case the employee seeks damages, in the form of lost wages, for the period of discrimination, and the employer attempts to show that the employee failed to mitigate those damages. An analogous situation is present in this instance, Hanna seeks damages, in the form of lost wages, for the period he was denied employment with seniority, and AMC attempts to show that Hanna failed to mitigate those damages.

ment between April 24, 1973, and November 14, 1977. This court stated in *Sprogis* that reasonable diligence in seeking comparable employment includes "check[ing] want ads, register[ing] with employment agencies, and discuss[ing] employment opportunities with friends and acquaintances." 517 F.2d at 392. Furthermore, "[i]n *Sprogis* we held that an employment discrimination plaintiff's formal application for one job and her procurement of another, temporary, position during a two-year period constituted 'reasonable diligence' in attempting to find alternative employment. . . ." *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 756 (7th Cir.), *cert. denied*, 52 U.S.L.W. 3422 (U.S. Nov. 28, 1983) (No. 83-205) ("*Orzel*"). Similarly, in *Orzel* we held that an assistant chief of the Wauwatosa Fire Department, who, during a two-year period, worked as a temporary census taker, applied for a job with the United States Postal Service but was not hired, and placed his name on file with the Wisconsin Job Service, did not fail to mitigate damages. *Orzel*, 697 F.2d at 756-57.

In this instance, AMC failed to introduce a scintilla of evidence to contradict or discredit Hanna's testimony that he had placed applications on file with various employees [sic], registered with the employment office, discussed employment opportunities with others, checked the want-ads, or secured temporary employment, between April 24, 1973, and November 14, 1977. Instead, AMC introduced Hanna's UW-Parkside student transcript into evidence and relied upon the rationale of *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 268 (10th Cir. 1975) ("*Taylor*"), to claim that Hanna's enrollment as a full-time, day student at UW-Parkside constituted a failure to mitigate damages. In *Taylor* the United States Court of Appeals for the Tenth Circuit held that the district court had not abused its discretion to award damages, under 42 U.S.C. § 2000e-5(g), by not including the time of an employee's school attendance in the damage computation. The court reasoned that, "[w]hen an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school also would be like receiving a double benefit." 524 F.2d at 268.

The record reveals that Hanna, who enrolled in a total of sixty-six credit hours at UW-Parkside but earned only sixteen credit

hours, offered uncontradicted testimony that he obtained no employment from the skills he learned at UW-Parkside and the only reason he enrolled in school was because he "didn't have a job . . . and it was a means of getting some money and income [from veterans' benefits] and plus learning something." Additionally, the parties stipulated to the amount of veterans' benefits Hanna received under the "G.I. bill" while attending school, and subtracted that amount, along with the money Hanna earned from the Wisconsin Natural Gas Company and the Kenosha County Parks Commission, from the total amount of lost wages due for the period between April 24, 1973, and November 14, 1977.[7] Accordingly, Hanna will receive no double benefit for the period he attended UW-Parkside because of the court approved stipulation that subtracted all the veterans' benefits he received ($7,016.00), while in school, from the damage claim. Furthermore, the district court found that:

> "[Hanna] did not abandon his willingness to return to work by becoming a student at UW-Parkside in September of 1973. . . . [H]is decision to return to school [was] more accurately . . . characterized as . . . an alternative that was better than anything else Mr. Hanna had going for him at the moment."

The court added that:

> "Had [Hanna] been offered a job at AMC with the correct seniority date, I find that he would have either quit school and returned to the job or would have restructured his school courses so that he could return to full time employment while still remaining a student."

The evidence presented at the trial for damages revealed that Hanna entered school not to "reap greater future earnings" but

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[7]AMC and Hanna stipulated that Hanna received $7,016.00 in veterans' benefits under the "G.I. bill" between April 24, 1973 and November 14, 1977. In addition, Hanna earned $598.00 while employed by the Wisconsin Natural Gas Company and $1,312.00 while employed by the Kenosha County Parks Commission.

because he "didn't have a job . . . and it was a means of getting some money and income" from veterans' benefits. Thus, we agree with the district court that Hanna enrolled in school only because that "alternative . . . was better than any thing else [he] had going for him at the moment." Hanna's uncontradicted testimony, that while attending UW-Parkside he applied for and was at all times ready, willing, and available to accept employment comparable to that of AMC, and the district court's finding that Hanna "did not abandon his willingness to return to work by becoming a student at UW-Parkside," reveal that Hanna had not "curtail[ed] his present earning capacity." Accordingly, the rationale of *Taylor*, that an award of lost wages for the period in which one attends school, and thereby curtails his present earning capacity in order to reap greater future earnings, constitutes a double benefit, certainly does not apply to the facts in this instance. *See, e.g., Washington v. Kroger Co.*, 671 F.2d 1072, 1079 (8th Cir. 1982). In light of the fact that Hanna's testimony remained uncontradicted, the record is void of any other proof on AMC's behalf that Hanna "failed to exercise reasonable diligence in mitigating his damages."

Consequently, the district court's findings of fact that Hanna "should have more diligently pursued work that was available" and that Hanna's enrolling at UW-Parkside "significantly cooled his ardor for job hunting" find no support in the record. In addition, these unsupported findings directly conflict with the district court's finding that:

> "Had [Hanna] been offered a job at AMC with the correct seniority date, I find that he would have either quit school and returned to the job or would have restructured his school courses so that he could return to full time employment while still remaining a student."

AMC offered no evidence to contradict the testimony of Hanna or Kenneth Neill, supervisor of Kenosha Job Service, and the district court found neither witnesses' testimony incredible. Moreover, we are unable to find any evidence in the record to contradict the testimony of Hanna or Neill, or to contradict our acceptance of their testimony as a verity. *See, e.g., Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 47 (7th Cir. 1980); *Apolskis v. Concord Life Insurance Co.*, 445 F.2d 31, 34 (7th Cir. 1971).

At the trial for damages, Hanna established that he visited the Kenosha Job Service office, personally placed applications on file at factories in Waukegan, Illinois, Racine, Wisconsin, and Kenosha, Wisconsin, read the want-ads of the *Kenosha News*, discussed employment opportunities with friends, and worked at least two jobs between April 24, 1973, and November 14, 1977. These actions are more than sufficient to constitute "reasonable diligence" on the part of Hanna. *Accord Orzel*, 697 F.2d at 756-57; *Sprogis*, 517 F.2d at 392-93. In light of AMC's failure to introduce evidence to the contrary and in view of present case law, we hold that the district court's findings of fact that Hanna "should have more diligently pursued work that was available" and that Hanna's enrolling in UW-Parkside "significantly cooled his ardor for job hunting" are clearly erroneous.[8]

In addition, AMC utterly failed to establish that "there was a reasonable likelihood [Hanna] might have found comparable work" between April 24, 1973, and November 14, 1977. The only evidence in the record on this point consists of Neill's testimony that though work was available for an unskilled laborer within a twenty-seven mile commuting area of Kenosha, there was "no *comparable* employment to American Motors when all factors [were] concerned [sic]." (emphasis added). AMC offered no evidence to rebut this testimony or to show that jobs existed which were comparable in "pay, status, and other factors to the position" at AMC.

Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730 (E.D.N.Y. 1978). *See also Ballard v. Eldorado Tire Co.*, 512 F.2d at 906. The fact that Hanna left two jobs which were not comparable to AMC

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[8]In reviewing the district court's finding of fact we are bound by the finding unless it is clearly erroneous. Fed. R. Civ. P. 52(a). Thus, unless we are left with a "definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), we must accept the trial court's findings. *See Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982). In this instance, AMC's failure to introduce any evidence, other than Hanna's UW-Parkside student transcript, on the issue of Hanna's "reasonable diligence," leaves us with a "definite and firm conviction" that the trial court erred in finding that Hanna "should have more diligently pursued work that was available" and that Hanna's enrolling in UW-Parkside, "significantly cooled his ardor for job hunting."

is of no consequence. A veteran who has been denied reemployment in violation of the Vietnam Veterans' Readjustment Act, has no duty, under the principles of mitigation, to continue at a job which is not comparable to his previous position. As we stated in *O'Mara v. Petersen Sand & Gravel Co.*, 498 F.2d at 897-98, a case arising under the Military Service Act of 1971, 50 U.S.C. App. § 451 *et seq.* (Supp. I 1971), the predecessor to 38 U.S.C. § 2201, *et seq.*,[9] "[the plaintiff] did not improperly fail to mitigage damages by quitting . . . as a laborer, a position inferior to the position as scalemaster." *See also Hanna I*, 557 F.2d at 122 (Hanna did not waive his rights under the Act by his April 24, 1973, refusal to continue in the inferior status afforded him by the defendant). Thus, the district court's finding of fact that "work of a somewhat comparable nature to the unskilled labor performed by Mr. Hanna at AMC was available in the Kenosha area in which Mr. Hanna lived during the period in question," is not supported by the record and, therefore, is clearly erroneous.

In light of Hanna's repeated and continuous efforts to secure employment,[10] and the absence of any proof by AMC concerning Hanna's lack of reasonable diligence or the availability of comparable employment, we conclude that AMC failed to meet its burden of proof on the issue of mitigation. *See, e.g., NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d at 108. Accordingly, we hold the district court's findings of fact that:

> "[w]ork of a somewhat comparable nature to the unskilled labor performed by Mr. Hanna at AMC was

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[9] *See* footnote 4.

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[10] According to the United States Court of Appeals for the Tenth Circuit in *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980)

> "[a] claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standard of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort." 639 F.2d at 627 (quoting *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979)).

> available in the Kenosha area in which Mr. Hanna lived during the period in question[;] . . . Mr. Hanna . . . should have more diligently pursued work that was available[;] . . . AMC has demonstrated that Mr. Hanna has failed to properly mitigate his damages [; and]
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> * * *
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> [Hanna's] enrollment for almost three years as a full time college student . . . significantly cooled his ardor for job hunting[,]"

are not supported by the record and thus are clearly erroneous. Based upon the evidence presented at the trial for damages, AMC did not demonstrate that Hanna failed to mitigate his damages. The district court's decision, therefore, to reduce the amount of lost wages awarded Hanna for the period between April 24, 1973, and November 14, 1977, due to Hanna's apparent failure to mitigate damages, rises to an abuse of discretion. Accordingly, we hold that the appellant is to receive compensation for his wages lost during the period between April 24, 1973, and November 14, 1977, less the stipulated amount received as veterans' benefits under the "G.I. bill" and the stipulated amounts earned from employment with the Wisconsin Natural Gas Co. and the Kenosha County Parks Commission. In sum, Hanna is to receive $28,905.00 rather than the $8,671.50 awarded by the district court, for the period of his wrongful discharge from April 24, 1973, until November 14, 1977.[11]

C. *PREJUDGMENT INTEREST*

The appellant next contends that he is entitled to the interest which accured before June 23, 1977, the date of this court's decision in *Hanna I*, on the damages awarded by the district court for the period between December 18, 1970, and February 28, 1971, and to the interest which accrued before October 27, 1982, the

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[11]Appellant is entitled to $37,831.00 in lost wages, less $8,926.00 for money received as veterans' benefits under the "G.I. bill" and money earned from his employment with the Wisconsin Natural Gas Company and the Kenosha County Parks System.

date of the district court's decision, on the damages awarded for the period between April 24, 1973, and November 14, 1977. Appellant initially refers to the district court's ruling which provided, in pertinent part:

> "On the December 18, 1970 to February 28, 1971 award of $1,100.74, I believe a further award of post-judgment interest from June 23, 1977 (the date of the decision in *Hanna I*) to date is appropriate. Because of the closeness of the liability question and the good faith of AMC in reasonably construing its collective bargaining agreement with the UAW (in other words, I do not in any way view this case as one where AMC blatantly disregarded the rights of a veteran), I will not award interest on the damages found to be due for the period of time that followed April 24, 1973."

Appellant asserts that "good faith is not a defense to prejudgment interest," in a case arising under the Vietnam Veterans' Readjustment Act, *see Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981), thus, in this instance, the trial judge erred by refusing to grant Hanna prejudgment interest on the damage award.

Though the award of prejudgment interest in an action under the Vietnam Veterans' Readjustment Act lies within the trial judge's discretion, *Hembree v. Georgia Power Co.*, 637 F.2d at 429; *Chernoff v. Pandick Press, Inc.*, 440 F. Supp. 822, 827 (S.D.N.Y. 1977), we note the United States Supreme Court's language in *Fishgold v. Sullivan*, 328 U.S. 275 (1946) that:

> "The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.
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> * * *

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . "

328 U.S. at 284-85. *See also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977); *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1350 (8th Cir. 1983); *Hanna I*, 557 F.2d at 119-20. The purpose of the Vietnam Veterans' Readjustment Act "is that the veteran should be *made whole*, and reimbursed for the measurable wage disadvantage or loss suffered through his incorrect reinstatement." (emphasis added). *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d at 367. Finally,

> "[i]nterest is a proper ingredient of the instant 'make whole' remedy and should be granted. Prejudgment interest is viewed as effectuating the purposes of the Act, particularly that of encouraging reemployment of veterans . . . at the earliest opportunity."

Peel v. Florida Department of Transportation, 500 F. Supp. at 528 (and cases cited therein).

In accord with the policy of the Vietnam Veterans' Readjustment Act that "one called to the colors [is] not to be penalized upon his return by reason of his absence from his civilian job," *Fishgold v. Sullivan*, 328 U.S. at 284, the trial judge's discretion in awarding prejudgment interest must be guided by the principle of "making whole" the returning veteran. Thus, the employer's denial of employment to a returning veteran, based upon an apparent "good faith" reliance on the Union bargaining agreement, is of no consequence in a case arising under the Vietnam Veterans' Readjustment Act. For as the United States Supreme Court stated in *Fishgold*, *"no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."* (emphasis added). 328 U.S. at 285. Furthermore, as this court stated in *Hanna I*, with regard to Hanna's original "lay off", "[i]t is irrelevant that [AMC] may have laid [Hanna] off in good faith." 557 F.2d at 122.

Applying that rationale to the facts of this instance, the district court's reliance upon "the good faith of AMC" in order to deny Hanna prejudgment interest, and thus prevent him from being "made whole," was improper. *See Hembree v. Georgia Power Co.*, 637 F.2d at 429-30; *Coffy v. Republic Steel Corp.*, 91 Lab. Cas. ¶ 12,843 (N.D. Ohio 1981) (on remand from the United States Supreme Court). In addition, the district court's reliance upon the "closeness of the liability question" in order to deny Hanna prejudgment interest was also improper, in light of our holding that the liability question is well-settled and AMC owes Hanna full wages lost for the period between April 14, 1973, and November 24, 1977. Thus, in furtherance of our duty to liberally construe the Act for those "called to the colors" we hold that the district court's denial of prejudgment interest, based upon AMC's apparent "good faith" and "closeness of the liability question" without any apparent regard for the policy to "make whole" a returning veteran, rises to an abuse of discretion. *Accord Hembree v. Georgia Power Co.*, 637 F.2d at 430. *Contra, Chernoff v. Pandick Press, Inc.*, 440 F. Supp. at 827.[12]

In order that Hanna be "made whole," we award him prejudgment interest, at the rate of 7% per annum, on the $28,905.00 awarded in lost wages for the period between April 24, 1973 and

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[12]The district court reasoned in *Chernoff v. Pandick Press* that, "[b]y receiving his lost wages as a lump sum, [plaintiff] will find himself in a much better financial position than if he had been continuously employed by [defendant]. . . . [Plantiff] will have been at least fully 'made whole' even without an award of [prejudgment] interest." The district court failed to support this novel and unique theory with any case law and we are unable to find any case law providing that a returning veteran who is denied prejudgment interest is "made whole," within the meaning of the Vietnam Veterans' Readjustment Act, simply because he received lost wages in a lump sum payment. In fact, according to the "legislation's overall purpose . . . the [returning] veteran should be made whole, *and reimbursed for the loss suffered through his incorrect reinstatement*," (emphasis added) *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d at 367, including the interest that would have accrued on the lost wages unlawfully denied the veteran. *Accord Hembree v. Georgia Power Co.*, 637 F.2d at 430; *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 53 (N.D. Miss. 1981); *Coffy v. Republic Steel Corp.*, 91 Lab. Cas. ¶12,843 (N.D. Ohio 1981) (on remand from the United States Supreme Court); *Peel v. Florida Department of Transportation*, 500 F. Supp. at 528.

November 14, 1977.[13] We calculate the total amount of prejudgment interest on this award to be $15,347.56.[14] In addition, we award Hanna prejudgment interest, at the rate of 7% per annum, on the $1,100.74 awarded by the district court for the period between December 18, 1970, and February 28, 1971. We calculate this interest, which accrued before this court's decision in *Hanna I*, to be $487.97.[15]

D. *FORD MOTOR CO. v. EEOC*

Cross-appellant, AMC, contends that the United States Supreme Court's decision in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), precludes Hanna from recovering any lost wages for the period between April 24, 1973, and November 14, 1977. AMC

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[13]Pursuant to Fed. R. App. P. 37, "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest." In this instance, we instruct the district court to apply an interest rate of 7% per annum, the statutory interest rate in Wisconsin for the majority of the time in question. *See* Wis. Stats. § 814.04 (1977).

[14]Due to the fact that this lawsuit originated in 1975, and has been before this court on three separate occasions, we have calculated the prejudgment interest award in order to facilitate and expedite payment of the same in the district court.

According to the AMC wage schedule between April 24, 1973, and November 14, 1977, after subtracting the amount of veterans' benefits and the wages earned from the Wisconsin Natural Gas Company and the Kenosha County Parks System, Hanna would have received $3,911.81 in 1973, $5,798.00 in 1974, $6,643.64 in 1975, $5,419.72 in 1976, and $7,133.38 in 1976. The prejudgment interest accruing on this amount, between April 24, 1973, and the date of the district court's decision on October 27, 1982, is $15,347.56.

[15]The district court has already awarded $408.00 in postjudgment (post-*Hanna I*) interest on the $1,100.74 award for the period between December 18, 1970, and February 28, 1971. To that award of interest, we now add prejudgment interest, accruing between February 28, 1971, and June 23, 1977, (pre-*Hanna I*) in the amount of $487.97.

reasons that when it reemployed Hanna on March 22, 1973, as a "new hire," following his honorable discharge from the Armed Forces, AMC was relieved of any future duty to pay Hanna lost wages. In *Ford Motor Co. v. EEOC*, the United States Supreme Court held that when Ford refused to hire three qualified women for a certain position, instead hired three qualified men, later offered the same position to two of the women without seniority retroactive from their original application, and was then found liable for sex-based employment discrimination in violation of 42 U.S.C. § 2000e-2(a), Ford was not required to compensate the women for lost wages which accrued after Ford's job offer without retroactive seniority.

Following a careful reading of *Ford Motor Co. v. EEOC*, we conclude that the Court's holding is inapplicable to this case which arises under the Vietnam Veterans' Readjustment Act. Title 38 U.S.C. § 2021(b) requires that the veteran be "reemployed without loss of seniority" and that the veteran be given "such status in . . . employment as [he] would have enjoyed if [he] had continued in such employment continuously. . . . " Additionally, the United States Supreme Court has stated that a veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Corp.*, 328 U.S. at 284-85. If an employer adhered to the holding of *Ford Motor Co. v. EEOC* and offered the returning veteran his previous job but refused to grant the veteran proper seniority and status, the employer would be in direct violation of 38 U.S.C. § 2021(b). Because the application of *Ford Motor Co. v. EEOC* to a case arising under the Vietnam Veterans' Readjustment Act would not only demean the veteran's service to his country but would also promote unlawful activity, we agree with the district court and hold that the decision in *Ford Motor Co. v. EEOC* is inapplicable in this case. *Accord Stevens v. Tennessee Valley Authority*, 699 F.2d 314, 316 (6th Cir. 1983).

III

We reverse the judgment of the district court and award appellant $28,905.00 in lost wages, including prejudgment interest

in the amount of $15,347.56, for the period between April 24, 1973, and November 14, 1977. In addition, we award appellant prejudgment interest in the amount of $487.97 on the $1,100.74 in lost wages awarded by the district court for the period between December 18, 1970, and February 28, 1971. The district court is ordered to enter judgment accordingly.

BAUER, *Circuit Judge*, concurring in part, dissenting in part. I concur with the majority's conclusion that, in the absence of any contrary evidence from the defendant, the plaintiff's evidence established that he exercised reasonable diligence in seeking comparable employment.

In my opinion, however, the majority has misconstrued the prejudgment interest issue. The majority's exclusive reliance on the proposition that the district court's discretion "must be guided by the principle of 'making whole' the returning veteran," is incorrect. Rather, absent an explicit statutory directive requiring an award of prejudgment interest, in exercising its discretion the district court may consider other factors, including "an assessment of the equities" presented in the case. *See, e.g., Lodges 743 & 1746, International Association of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) (case arising under labor laws). The district court's consideration in this case of the amount of the plaintiff's recovery relative to the "closeness of the liability question" thus does not constitute an abuse of discretion. Moreover, even if the "make whole" policy of the Vietnam Veterans' Readjustment Act precludes such a consideration, nothing in the district court's opinion indicates that the award of $28,905.00 lost wages is insufficient to make the plaintiff whole, as did the lost wages in *Chernoff v. Pandick Press, Inc.*, 440 F. Supp. 822, 827 (S.D.N.Y. 1977). It is the district court's discretion that should control the result in this case. Accordingly, I dissent from that portion of the majority opinion.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SAMUEL C. HANNA,

Plaintiff,

v.

Civil Action
No. 75-C-27

AMERICAN MOTORS
CORPORATION,

Defendant.

MEMORANDUM DECISION and ORDER

This case, filed over seven and one-half years ago, was reassigned to me by the Clerk of this Court following the entry of a disqualification order by Judge Robert W. Warren of this district on February 23, 1982. Although it had not reached trial, the case was the subject of two decisions by the United States Court of Appeals. See *Hanna v. American Motors Corp.*, 557 F.2d 118 (7th Cir. 1977) and *Hanna v. American Motors*, an unpublished decision of the United States Court of Appeals for the Seventh Circuit dated January 5, 1981.

Following the second remand, which reversed an order dismissing the case for lack of prosecution, Judge Warren assessed costs against the plaintiff in the amount of $522.07. In his order of April 16, 1981, Judge Warren stated that the matter would not proceed further until the costs were paid.

For some reason, unascertainable from the record, the costs were not paid until 10 months later when, on February 17, 1982, plaintiff's counsel mailed a check in the appropriate amount to the attorney for the defendant. Thereafter, Judge Warren entered his disqualification order and the case was reassigned to me.

Following the reassignment, I discussed the case with counsel for both sides, and attempts were made to reach a settlement. No settlement resulted from the discussions and the case was tried to the court on October 25, 1982. At the conclusion of the trial, I stated I would take the matter under advisement and issue a written decision within one week. The following constitutes my decision and order on the merits of the case.

The plaintiff Samuel C. Hanna commenced work as an assemblyman at the defendant American Motors Corporation's (AMC) Kenosha, Wisconsin plant on September 14, 1970. A collective bargaining agreement in effect at the time between AMC and the United Auto Workers (UAW) required Mr. Hanna, as a new employee, to serve a 60-day probationary period before obtaining permanent status and a seniority date. After working 60 days, an employee was given permanent status and a seniority date that related back to the time when the employee started working at the company.

On September 17, 1970, AMC permitted the defendant to absent himself from work in order to take a mandatory military service pre-induction physical examination. Work was available for Mr. Hanna on the day that he took off. On December 2, 1970, Mr. Hanna was absent from work for reasons not explained in the record. However, on the following three workdays he was required to report to the Armed Forces Induction Center in Milwaukee, Wisconsin, for additional pre-induction physical examinations involving lengthy urinalysis. Mr. Hanna's presence at these examinations was mandatory under the then-applicable Selective Service law. Work was available for Mr. Hanna at the Kenosha plant on all the days that he did not report.

Mr. Hanna returned to work on December 8th and worked until December 18th, when he was laid off due to a reduction in work force. At the time of the layoff, Mr. Hanna had actually worked 56 days. If the four military service physical examination days had been counted towards the completion of his probationary period, Mr. Hanna would have worked 60 days and thus would have attained permanent employee status with a September 14, 1970 seniority date. He also would not have been laid off on

December 18, 1970 but would have worked until the next layoff on February 28, 1971.

On March 10, 1971, Mr. Hanna was inducted into the armed forces. He did not work at AMC from December 18, 1970 until his induction. On September 10, 1971, while Mr. Hanna was still in the service, AMC wrote to him stating that his employment was terminated because he failed to complete a 60-day probationary period within one year of his starting work for the company. AMC stated that its conclusion was based on its understanding of the collective bargaining agreement with the UAW.

Mr. Hanna was honorably discharged from the service on February 22, 1973. During his tour of duty, Mr. Hanna spent nine months in Vietnam.

On March 22, 1973, after his military discharge, Hanna was reemployed by AMC as a "new employee." AMC took the position that Hanna had no veterans reemployment rights under the Veterans Readjustment Act because he was terminated before he became a permanent employee. Shortly after being reemployed by AMC, Mr. Hanna complained that the company was violating his veterans reemployment rights by refusing to accord him seniority based on the date of his original hire, September 14, 1970. Apparently not satisfied with the response of AMC, Mr. Hanna left work on April 24, 1973 with the intention of quitting. He was terminated on that date by the company.

Because AMC refused to reinstate Mr. Hanna with a September 14, 1970 seniority date, the government filed this suit on his behalf in 1975[1]. In the suit, he sought reinstatement, establishment of a September 14, 1970 seniority date, and back pay and lost pension benefits.

Following the filing of the suit, both sides moved for summary judgment on the question of liability. The district court

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[1]The suit was instituted by the Department of Justice under 38 U.S.C. § 2022. Sometime between Hanna I and Hanna II, private counsel took over the case on Mr. Hanna's behalf.

granted AMC's motion, buying its argument that the plaintiff only occupied a temporary position with AMC prior to his induction. Therefore, the court found that Hanna was not protected by the Veterans Readjustment Act. The United States Court of Appeals for the Seventh Circuit, in its first decision in this case, reversed and found that the plaintiff was covered by the Act.

The Court of Appeals held that Hanna was not a "temporary" employee on December 18, 1970 when his layoff occurred. Rather, he should have been designated as a permanent non-probationary employee. As such, he should have been able to work until the February 28, 1970 layoff which would have caught him even if he was a properly classified employee.

The Court of Appeals also held that Mr. Hanna was entitled to reinstatement with a September 14, 1970 seniority date, and that he was entitled to collect damages from December 18, 1970 until at least February 28, 1971. The trial on October 25, 1982 concerned the amount of damages that should be awarded.

In a nutshell, the plaintiff contends that he should be awarded $1,100.74, the wages he lost between December 18, 1970 and February 28, 1971, and $37,831.00, the wages he lost between April 24, 1973 (the date he left AMC due to the seniority date dispute) and November 14, 1977[2] (the date he was reinstated at AMC with a September 14, 1970 seniority date following the Court of Appeals decision in *Hanna* I on June 23, 1977). To this total of $38,931.00, the plaintiff would add an unspecified amount for lost pension rights and subtract a total of $8,926.00[3] received during the period in question as a stipulated offset.

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[2]Mr. Hanna was fired by AMC in May of 1978 and takes no issue here with the manner in which he was terminated.

[3]$598.00 from a 1974 summer job with the Gas Company in Racine, $1,312.00 from a 1977 job with the Kenosha County Park Commission and $7,016.00 in veterans benefits received between September of 1973 and December of 1976 while Hanna was a full time college student.

I reject any claim for pension benefits in this case. The undisputed evidence presented at the trial clearly establishes that ten years of credited service, including 1,700 hours of work per year are necessary before a pension vests. Although the pension dollars are difficult to determine until an employee retires, the plaintiff has failed to convince me that he would have worked for AMC the requisite period of time necessary for his pension to vest. This conclusion is buttressed by the fact that Mr. Hanna was fired in May of 1978 and would have had no pension rights at that time even if he would have been employed without interruption from September 14, 1970. Thus, I find that plaintiff's claim is limited to a net amount, after offsets, of $30,005.00.

In attacking the plaintiff's claim, the defendant makes a number of arguments, the major one being that the plaintiff has failed to mitigate his damages. Closely related to this contention is AMC's claim that the plaintiff, by becoming a full time college student in September of 1973, abandoned his willingness to continue in AMC's employ. Thus, AMC argues, Hanna forfeited any right to back pay after September of 1973. In addition, in reliance on *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982), AMC argues that Mr. Hanna was not justified in quitting his job on April 24, 1973 over the seniority date dispute and thus he should not be permitted to recover damages after that date.

The Veterans Readjustment Act, 38 U.S.C. § 201, *et seq.* and its predecessors stressed the importance of returning a job-qualified veteran to his former position with "like seniority, status and pay." In a situation such as Mr. Hanna found himself in, seniority was extremely important. It went to the heart of the security Hanna could have in the future permanency of his job. Thus, I find that he did not waive his right to further back pay by quitting his job on April 24, 1973 when the seniority dispute was not resolved correctly in his favor. On this point, I find the *Ford Motor Co. v. EEOC* case cited by the defendant, which dealt with a sex discrimination claim, to be inapplicable.

I further find that the plaintiff did not abandon his willingness to return to work by becoming a student at UW-Parkside in September of 1973. I believe his decision to return to school can

more accurately be characterized as pursuing an alternative that was better than anything else Mr. Hanna had going for him at the moment. Had he been offered a job at AMC with the correct seniority date, I find that he would have either quit school and returned to the job or would have restructured his school courses so that he could return to full time employment while still remaining a student.

I do find, however, that Mr. Hanna's full time schooling interfered with his duty to mitigate his damages. Although he did secure some employment, it was of a seasonal nature, consistent with the kind of job that college students secure while continuing their educations.

Furthermore, I find that work of a somewhat comparable nature to the unskilled labor performed by Mr. Hanna at AMC was available in the Kenosha area in which Mr. Hanna lived during the period in question. Although it might have been difficult to find an unskilled laborer's job that paid as handsomely as did the one at AMC, Mr. Hanna nevertheless should have more diligently pursued work that was available. Thus, I find that to a significant extent, AMC has demonstrated that Mr. Hanna has failed to properly mitigate his damages.

I find no failure of a duty to mitigate between December 18, 1970 and February 28, 1971. Thus, during that period, I find that $1,100.74 is an appropriate amount to be awarded to the plaintiff. As to the remaining claim for $28,905.00, I find that a reduction should be made for failure to mitigate, the most important element of which was the plaintiff's enrollment for almost three years as a full time college student. Although, as I have said, I do not view his act as a waiver of his right to seek reinstatement at AMC, I believe it significantly cooled his ardor for job hunting. I believe a 70% reduction for failure to mitigate on this point is appropriate, and thus I award the plaintiff $8,671.50 for post-April 1973 damages. On the December 18, 1970 to February 28, 1971 award of $1,100.74, I believe a further award of post-judgment interest from June 23, 1977 (the date of the decision in Hanna I) to date is appropriate. Because of the closeness of the liability question and the good faith of AMC in reasonably construing its collective

bargaining agreement with the UAW (in other words, I do not in any way view this case as one where AMC blatantly disregarded the rights of a veteran), I will not award interest on the damages found to be due for the period of time that followed April 24, 1973.

Thus, the total award to the plaintiff will be $9,772.24 plus interest of $408.00, for a total of $10,180.24 plus costs. Judgment shall be entered accordingly.

SO ORDERED at Milwaukee, Wisconsin, this [27] day of October, 1982.

BY THE COURT:

/s/ [Terence Evans]
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Argued: December 16, 1980

January 5, 1981.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

SAMUEL C. HANNA, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 79-1303 vs.	)	
AMERICAN MOTORS CORPORATION, Defendant-Appellee.	)	No. 75-C-27 Robert W. Warren. *Judge.*

ORDER

I

Plaintiff-appellant, Samuel C. Hanna, appeals from the involuntary dismissal of his suit pursuant to Fed. R. Civ. P. 41(b). The suit is against American Motors Corporation (AMC) and was originally instituted on Hanna's behalf by the Department of Justice on January 16, 1975, under the reemployment provisions of the Vietnam Veterans Readjustment Act (38 U.S.C. §2024(d) and (e)). The relief sought included job reinstatement with proper seniority status and pay, as well as lost wages.

In 1977, the case was before this court on an earlier appeal from the district court's summary judgment granted in favor of AMC. The court reversed the district court's judgment, holding that Hanna was entitled under the Act to reinstatement and lost wages. It remanded the case to the district court for a determination of the amount of lost wages owed. *Hanna v. American Motors Corporation*, 557 F.2d 118, 122 (7th Cir. 1977).

On remand, the district court originally scheduled a final pretrial conference for July 14, 1978. Both parties subsequently moved that this conference be continued to August 1, 1978. The court's summary of the August 1st conference indicates that, at that time, the parties were encouraged to pursue settlement and a discovery cut-off date of October 2, 1978, was entered. A new final pretrial conference date was set for October 27, 1978. On October 18, 1978, the Justice Department filed a motion to withdraw as counsel for Hanna, citing as grounds therefor a possible conflict of interest. The district court granted the motion by order entered the same day. On October 27, 1978, Hanna failed to appear for the scheduled pretrial conference, and the conference was again reset for December 20, 1978. By letter dated October 30, 1978, Judge Warren informed Hanna of the new date for the final pretrial conference. He also enclosed in this letter a copy of the court's standing final pretrial order, and explained that it required the parties to prepare and file a joint final pretrial report at least three days before the scheduled conference and that the principal burden for the preparation of the report was on the plaintiff. The letter cautioned that the "[f]ailure of any party to comply with this Court's order could result in a dismissal of this action."

On or about November 16, 1978, Attorney Robert Sfasciotti informed the court that he had been retained as Hanna's counsel. He was informed of the final pretrial conference date and given a copy of the court's standing final pretrial order. Attorney Sfasciotti subsequently obtained two continuances of the final pretrial conference, first to January 12, and then to January 26, 1979. According to an affidavit filed with plaintiff's notice of appeal, the postponements were requested because of Attorney Sfasciotti's involvement in a criminal trial in another court during the week of December 20th, and because of his inability to obtain the Justice

Department's file on his client's case. Sfasciotti maintains that he needed the government's file to prepare the pretrial report but was unable to obtain it prior to January 26 as a result of inclement weather, his own illness, the government's caseworker's absence on vacation and then, upon her return, her refusal to allow the file out of her office.[1]

Despite his inability to review the government's file, Sfasciotti did not request a further continuance of the final pretrial conference set for January 26, 1979. Nor did he submit a pretrial report, although such a report was submitted by AMC. When the conference was called on January 26, 1979, neither Hanna nor his counsel were present. AMC moved to dismiss pursuant to Rule 41(b) for failure to comply with an order of the court, and the district court granted the motion. Attorney Sfasciotti arrived in court fourteen minutes after the time set for the conference. He asked to explain the situation to the court but was refused a hearing even though counsel for AMC was still available. Judgment was entered dismissing the action with prejudice on February 7, 1979.[2]

II

It is well-established that under Fed. R. Civ. P. 41(b), as well as under the inherent power of the court, a complaint can be dismissed with prejudice for want of prosecution or for failure to comply with a rule or order of the court.[3] *Link v. Wabash Ry. Co.*, 370 U.S. 626 (1962). Moreover, dismissal under such circumstances

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[1]Although the case was instituted by the Department of Justice under 38 U.S.C. § 2022, it was prosecuted by an attorney from the Office of the Solicitor, United States Department of Labor, out of a Chicago office.

[2]By directly appealing his Rule 41(b) dismissal, Hanna failed to utilize what is considered the better practice of first moving in the trial court under Rule 60(b) to vacate the dismissal and then appealing from the denial of that motion, if necessary. This is considered the better practice because it allows the trial court an opportunity to reconsider and correct its own mistakes. 5 Moore, Federal Practice ¶41.12 at 41-170 (1980); *Beshear v. Weinzapfel*, 474 F.2d 127, 130 (7th Cir. 1973).

[3]Often a failure to comply with an order of the court is viewed as a failure to prosecute. *See Link v. Wabash, supra; Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973).

rests largely within the discretion of the trial court and, absent a showing of abuse of that discretion, will not be overturned on appeal. 5 Moore, Federal Practice ¶41.12 at 41-169 (1980). The power to impose sanctions for a lack of prosecution or for a failure to comply with a court order is intended to assist the trial court in maintaining control over its own calendar and in preserving its integrity. Reviewing courts are understandably reluctant to interfere with a lower court's efforts to achieve either of these important goals.

On the other hand, courts have also recognized that "dismissal is a harsh sanction which should be resorted to only in extreme cases." *Scarver v. Allen*, 457 F.2d 308, 310 (7th Cir. 1972); *Richman v. General Motors Corporation*, 437 F.2d 196, 199 (1st Cir. 1971); *Davis v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967). *Moreno v. Collins*, 362 F.2d 176, 178 (7th Cir. 1966) ("It is, indeed, a high penalty for an innocent party to have her suit dismissed because her associate counsel, in a distant city, did not check with the Law Bulletin calendar at the very early stages of the case.") It is directly contrary to that policy of the law which favors the hearing of a litigant's claim upon the merits. *Scarver v. Allen, supra.* Moreover, because the court has a broad panoply of lesser sanctions available to it,[4] dismissal with prejudice should normally be invoked only as a last resort. *J.F. Edwards Const. Co. v. Anderson Safeway, Etc.*, 542 F.2d 1318, 1324 (7th Cir. 1976); *Richman v. General Motors Corp., supra; Flaska v. Little River Marine Const. Co.*, 389 F.2d 885, 888 (5th Cir. 1968). This court has stated, with regard to enforcement of a court's pretrial order, "[t]he ultimate sanction of dismissal should be utilized only in the face of conduct so reprehensible that no other alternate sanction would protect the integrity of the pre-trial procedures contemplated by Rule 16." *J.F. Edwards Const. Co. v. Anderson Safeway, Etc., supra.* Other courts have similarly limited use of the sanction of dismissal to cases in which there is a showing of extreme circumstances. As Judge Wisdom stated in *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967):

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[4]*E.g.* contempt, fines, imposition of costs, conditional orders of dismissal, etc. *See generally* Sanction at Pre-Trial Stages, 72 Yale LJ 819 (1963).

> [t]he sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a *careful* exercise of judicial discretion. Durgin v. Graham, 1967, 5 Cir., 372 F.2d 130, 131. The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.

See also Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974); *Dove v. Codesco*, 569 F.2d 807, 810 (4th Cir. 1978).

Despite the severity of the sanction, AMC argues that dismissal was warranted in this case whether failure to comply with the court's order is considered by itself or in the context of the surrounding circumstances. It argues that Hanna's disobedience of the district court's pretrial order was preceded by a course of unqualified indifference to the court and that the disobedience itself amounted to a deliberate and inexcusable disregard of the order.

In arguing that the circumstances preceding Hanna's disobedience of the court's order support the district court's dismissal of his suit, AMC seeks to place responsibility for the lengthy procedural history of this case primarily on Hanna's shoulders. The record does not support this contention. Much of the delay in the case resulted from the erroneous entry of summary judgment against Hanna, reversed by this court on appeal. On remand, a status conference was held on February 15, 1978, at which time the district court scheduled a final pretrial conference for July 14, 1978, and entered its standing pretrial order. Although this conference was subsequently continued to August 1, 1978, AMC can hardly blame Hanna for this delay since both parties together requested the continuance.

AMC does contend, however, that Hanna's attendance of the August 1, 1978, conference without filing his pretrial report constituted open disregard of the court's pretrial order. Even this claim is not well-founded. At the time of the August conference, Hanna was still represented by the Justice Department and the parties were in the midst of discovery. Although the conference was designated a final pretrial conference, it appears that neither the parties, nor

the court, regarded it as such. The court's summary of the conference indicates that the parties were encouraged to continue to pursue settlement and a discovery cut-off date was set for October 2, 1978. No mention was made of Hanna's failure to file a pretrial report prior to the conference. Under these circumstances, we refuse to view such failure as evidencing a disregard of the court's standing pretrial order.

AMC also states that during this period Hanna refused to answer interrogatories which it had propounded to him and instead filed objections. Of course, this cannot be construed as evidence of delay since this is precisely the procedure called for when a party claims valid grounds for refusing to answer. Rule 33, Fed. R. Civ. P. There is no indication in the record that Hanna's objections were wholly without merit or raised merely for purposes of delay.

The first clear instance of Hanna's disobedience of an order of the court was his failure to appear at the pretrial conference set for October 27, 1978. This occurred less than ten days after the district court granted the government's motion to withdraw as counsel and before Hanna had retained new counsel. While not excusable, this conduct may be somewhat mitigated by these facts. In any event, it does not constitute the kind of "unqualified indifference to the court" claimed by AMC.

Still, it is undisputed that plaintiff did in fact disobey the district court's order by failing to file a pretrial conference report and by failing to appear on time at the final pretrial conference. When viewed in the context of his failure to appear at the October 27th conference, and the two continuances subsequently requested and obtained from the court, it becomes a close question as to whether the district court's dismissal of the action constitutes an abuse of discretion.

Nevertheless, we conclude that it does constitute an abuse of discretion and that lesser sanctions should have been utilized. This is not a case with so little merit that the failure to arrive on time for a scheduled pretrial conference can be viewed as indicative of a lack of inclination on the part of the plaintiff to try his case. *See Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973). At the time

of the dismissal, Hanna had already pursued his claim once through the appellate process and had essentially won on the question of liability. All that remained to be determined on remand was what, if any, damages he was entitled to recover. The fact that Hanna retained private counsel after the Department of Justice withdrew is further reflective of his continued intent to pursue his claim.

Of course, even meritorious claims are properly subject to dismissal under Fed. R. Civ. P. 41(b), where a plaintiff fails to comply with a valid court order. But a proper exercise of discretion requires that the harshest of possible sanctions be utilized only when lesser ones would most likely fail to protect the interests at stake. In our view, this was not such a case.

Plaintiff's conduct, to be sure, is deserving of some penalty. The failure to comply with an order of the court not only causes unnecessary delay, but is an affront to the court's integrity. Such conduct cannot be allowed to go unsanctioned. However, dismissal of an obviously meritorious claim is simply too harsh under these circumstances. We see no conduct so reprehensible that a liberal allowance of costs for the delay caused by Hanna's failure to comply with the court's order would not serve as an adequate remedy. We therefore vacate the district court's order of dismissal and reinstate plaintiff's action, contingent upon his payment of costs, including attorney's fees, for the thwarted pretrial conference. Such costs are to be assessed by the district court on remand. The parties shall each bear their own costs on this appeal.

* * * * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SAMUEL C. HANNA,

Plaintiff,

vs. Case No. 75-C-27

AMERICAN MOTORS CORPORATION,

Defendant.

ORDER

On January 26, 1979, a final pretrial conference was scheduled in the above-captioned case. According to the Court's standing final pretrial order distributed to the parties some months ago, the final pretrial report was to be submitted to the Court three days prior to this scheduled conference. Although this was to be a joint report, primary responsibility for the compilation and submission of said report rests with the plaintiff.

Plaintiff failed to submit the final pretrial report to the Court prior to the scheduled final pretrial conference and failed to appear on time for the scheduled conference. On motion of the defendant, the Court dismissed the action.

In doing so, the Court noted that plaintiff failed to comply with the Court's final pretrial order and failed to make a timely appearance at the final pretrial conference. In addition, the Court recounted the current procedural history of this case. On October 27, 1978, a final pretrial conference was scheduled but plaintiff failed to appear so another final pretrial conference was set for December 20, 1978. On about November 16, 1978, Attorney Robert Sfasciotti informed the Court that he had been retained

as plaintiff's counsel. The Court informed him of the final pretrial conference date and sent him a copy of the Court's standing final pretrial order.

On December 19, 1978, at the request of plaintiff's counsel, the scheduled final pretrial conference was postponed until January 12, 1979. On January 10, 1979, this January 12 final pretrial conference was rescheduled for January 26, 1979, again at the request of plaintiff's counsel.

No request was made to reschedule the January 26, 1979 conference nor was there any request to delay submission of the final pretrial report.

At the final pretrial conference, the Court observed that no final pretrial report had been filed, that plaintiff's counsel failed to appear at the time scheduled and that this was the fourth time a final pretrial conference had been scheduled in this action (the third time since Mr. Sfasciotti was retained as plaintiff's counsel). The Court granted defendant's motion to dismiss the action.

Based on the foregoing, this Court hereby orders that this action be and is hereby dismissed with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure without costs to either party.

SO ORDERED this [6th] day of [February], 1979, at Milwaukee, Wisconsin.

/s/ [Robert W. Warren]
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1727

SAMUEL C. HANNA,

Plaintiff-Appellant,

v.

AMERICAN MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 75-C-27 — **Robert W. Warren,** *Judge*

ARGUED JANUARY 17, 1977 — DECIDED JUNE 23, 1977

Before FAIRCHILD, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

CUMMINGS, *Circuit Judge*. Plaintiff brought this suit to obtain job reinstatement with proper "seniority, status and pay," including lost wages, under the reemployment provisions of the Vietnam Veterans' Readjustment Act (38 U.S.C. § 2024(d) and (e)). Plaintiff is an honorably discharged veteran whose suit was instituted by the Department of Justice under 38 U.S.C. § 2022. He commenced work as an assemblyman at defendant American Motors Corporation's Kenosha, Wisconsin, plant on September 14, 1970. The applicable collective bargaining agreement required him, as a new employee, to serve a 60-day probationary period before obtaining seniority. Attainment of seniority after the 60-day period was automatic and related back to the employee's hiring date.

On September 17, 1970, defendant permitted plaintiff to absent himself from work in order to take a mandatory military service pre-induction physical examination. Work was available for the plaintiff that day if he had not been required to take the physical. On September 21, his hourly wage was increased from $3.25 per hour to $3.60 per hour at the request of his foreman.

On Wednesday, December 2, 1970, plaintiff was absent from work for reasons not apparent from the record. However, on Thursday, December 3, Friday, December 4, and Monday, December 7, 1970, he was required to report to the Armed Forces Induction Center in Milwaukee, Wisconsin, for additional pre-induction physical examinations involving lengthy urinalyses. Plaintiff's presence at these examinations was mandatory under the Selective Service Act. Work would have been available for plaintiff at the Kenosha plant on all four of those days had he reported. He was put back to work on Tuesday, December 8, and worked until December 18, when he was laid off due to a reduction in force. This reduction included all assembly linemen who had not yet completed their 60-day probationary period. At that time, plaintiff had actually worked 56 days. Therefore, if the four military service physical examination days had been counted toward the completion of his probationary period, plaintiff would have attained a seniority status with a September 14, 1970, seniority date and would not have been laid off until February 28, 1971.

On March 10, 1971, plaintiff was inducted into the Armed Forces before being recalled to active employment by defendant. Six months later, on September 10, 1971, while he was still in military service, defendant wrote plaintiff that his employment was terminated because he had failed to complete the 60-day probationary period within one year of the date of his first employment, pursuant to the collective bargaining agreement.

Plaintiff was honorably discharged from military service on February 22, 1973, and was reemployed by defendant as a "new hire" on March 22, 1973, well within the statutory 90-day period for reemployment. 38 U.S.C. § 2021(a)(2). Defendant took the position that plaintiff had no veteran's reemployment rights under the Vietnam Veterans' Readjustment Act because he had been ter-

minated before attaining seniority status and therefore was only a temporary employee and outside the scope of the Act. On April 2, his hourly wage as a new hire was increased from $4.14 to $4.52 per hour at the request of his foreman.

On April 23, plaintiff complained to defendant that it was violating his veteran's reemployment rights by refusing to accord him seniority based on the date of his original hire, September 14, 1970. Not receiving any satisfaction from defendant, plaintiff left work on April 24, 1973, with the intention of quitting. He was therefore terminated by defendant on that date although his ability, conduct and work performance were still considered as "average" by defendant.

Because defendant refused to reinstate plaintiff with the claimed seniority, the Government filed this suit on his behalf. Both parties filed motions for summary judgment on the question of liability. The district court granted defendant's summary judgment on the ground that plaintiff had only occupied a temporary position and therefore was not covered by the Vietnam Veterans' Readjustment Act. This appeal followed. We reverse.

The statute in question[1] provides that a job-qualified returning veteran is entitled to be restored to his former position or "to a position of like seniority, status and pay." 38 U.S.C. § 2021(a)(B)(i). A workman "called to the colors was not to be penalized on his return by reason of his absence from his civilian job." The statute places the returning veteran on the seniority

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[1]The original statute establishing veterans' reemployment rights was the Selective Training and Service Act of 1940, 54 Stat. 885. The name of the Act was changed in 1948 to the Selective Service Act of 1948, 62 Stat. 604, and again in 1951 to the Universal Military Training and Service Act, 65 Stat. 75. In 1967 the Act was renamed the Military Selective Service Act of 1967, 81 Stat. 100, and in 1971 the name was changed to the Military Selective Service Act, 85 Stat. 348, and found at 50 U.S.C. App. § 459. The reemployment provisions of the Military Selective Service Act were codified in 1974 with non-substantive wording changes in the Vietnam Veterans' Readjustment Act of 1974, 88 Stat. 1578, 38 U.S.C. § 2021 *et seq.* The reemployment provisions of the various Acts are substantially identical. Thus the judicial precedents developed under them are largely interchangeable.

escalator "at the precise point he would have occupied had he kept his position continuously during the war." See *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 284-285; 38 U.S.C. § 2021(b)(2). It accords an employee a leave of absence for purposes of pre-induction Armed Forces physical examinations, and therefore the employee must be permitted to return to his position "with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U.S.C. § 2024(d) and (e). This protection is equal to that provided individuals embarking on active duty. *Fortenberg v. Owen Bros. Packing Co.*, 267 F. Supp. 605 (S.D. Miss. 1966), affirmed, 378 F.2d 373 (5th Cir. 1967). However, this statutory protection extends only to an employee who absents himself from a position "other than a temporary position." 38 U.S.C. § 2021(a)(A) and (B) and § 2024(e).

Under *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169, 181, a returning veteran is entitled to count his military service time toward a promotion if he demonstrates that as a matter of foresight it was reasonably certain that advancement would have occurred and that it did occur as a matter of hindsight. However, *Tilton* lays down the condition that a "returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period." *Id.* In *Brickner v. Johnson Motors*, 425 F.2d 75 (7th Cir. 1970), we applied *Tilton* and overruled our previous decision in *Lesher v. P.R. Mallory & Co., Inc.*, 166 F.2d 983 (7th Cir. 1947), in interpreting the phrase "other than a temporary position." In *Brickner* we established a two-part test for determining whether a position is "other than temporary." If the position itself is temporary, the employee is excluded from the protection of the Act. To satisfy the second criterion, we held

> "an employee who has a probationary status previous to leaving for military service must show that as a matter of foresight it was reasonably foreseeable that upon completion of the probationary period the employee would receive permanent status and as a matter of hindsight, it did in fact occur. *The inquiry is not whether the employee would complete the probationary period*

> *but upon completion whether the employee would receive permanent status.*" (425 F.2d at 77) (Emphasis supplied).

The collective bargaining agreement in *Brickner* provided automatic permanent status at the completion of a 90-day probation period. Since Brickner completed a new probationary period after his return from service, this Court found that he held an "other than temporary position." Plaintiff was held entitled to seniority from his original date of employment.

Our mandate is "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 285. Accord, *Alabama Power Co. v. Davis*, 45 LW 4588, 4589. The Act's purpose is "to assure that these changes and advancements in status that would necessarily have occurred simply by continued employment will not be denied the veteran because of his absence in the military service.'" *Id.* n. 8. In this task, the Supreme Court has rejected the idea that "the Act protects only rights which are a mere function of time in grade and does not entitle the veteran to be treated as if he had been actively employed or trained during the period of military service." *Tilton, supra*, 376 U.S. at 176. It is in the light of these principles that we apply *Brickner* to this case.

Plaintiff's position with defendant was "other than temporary" under the first *Brickner* test because the defendant concedes here that the position of assemblyman is permanent (App. 80). The foresight aspect of the second inquiry of *Brickner* is satisfied because, except for the four days spent at the pre-induction physical examinations, plaintiff would have acquired permanent status by December 18, 1970, when he was laid off, for permanent status was automatic upon the completion of the probationary period. *Collins v. Weirton Steel Co.*, 398 F.2d 305, 309-310 (4th Cir. 1968). His advancement to permanent status was not "subject to a significant contingency." *Alabama Power, supra*, 45 LW at 4590.

Under the hindsight test of *Brickner*, permanent status did occur in point of law (despite defendant's protestations) by December 18 because work was available for him on the four physical examination days and his work was routinely found satisfactory before layoff. Contrary to defendant's argument, *Brickner* did not hold that a veteran must have completed his probationary period before acquiring any rights under the Act. Such a holding would have in large measure rendered meaningless this Court's decision to overrule the rule of *Lesher v. P. R. Mallory & Co., Inc.*, 166 F.2d 983 (7th Cir. 1947), that a probationary employee *per se* occupies a "temporary position." Unlike the present case, Brickner had 57 days left to serve in his probationary period when he entered miltary service. Nothing in *Brickner* indicates that the plaintiff there had been granted any days of leave of absence status due to military reasons. Consequently, whether the four days plaintiff was required to attend pre-induction physicals may be counted towards the completion of the probationary period, thereby fulfilling the strict hindsight test, is an open question in this Court.

The strict hindsight prong of the *Brickner* test has subsequently been somewhat muted in *Pomrening v. United Airlines, Inc.*, 448 F.2d 609, 613 (7th Cir. 1971):

> "it must appear, as a matter of hindsight, that [plaintiff] would have probably completed his [probation] in the normal course had it not been interrupted by his military service."

In *Tilton* where job-qualifying training was involved, the Act cannot serve as a magic wand which gives a job to a returning veteran which requires training for its successful performance unless he first completed his training period. But when a probation rather than a training program is involved, *Brickner* itself directs that the "inquiry is not whether the employee would complete the probationary period but upon completion whether the employee would receive permanent status." 425 F.2d at 77; *United States* ex rel. *Adams v. General Motors Corp.*, 525 F.2d 161 (6th Cir. 1975). Since plaintiff's ability, conduct and work performance were concededly satisfactory, he actually would have received permanent status but for military service since the probationary period here

was not intended to develop skills or increase proficiency." As a probationary employee [Hanna] had every reason to expect that his employment would be continuous and for the indefinite future"; in short, "other than temporary." *Moe v. Eastern Air Lines*, 246 F.2d 215, 219 (5th Cir. 1957); *Collins v. Weirton Steel Co.*, 398 F.2d 305, 309 n. 6 (4th Cir. 1968). Therefore, when laid off on December 18, 1970, plaintiff was in "other than a temporary" position.

In any event, application of a strict hindsight principle is unnecessary where the employer refuses to rehire a veteran whose probation is incomplete. *Collins, supra*, 398 F.2d at 309 n. 8. Here, as shown above, if the company had credited the four days of physicals, plaintiff would not have been laid off until over two months later than he actually was. By refusing to let plaintiff work through February 28, when the next most junior men were laid off, defendant made it impossible for plaintiff to complete his probation within a year of the date of his first employment despite his ability and willingness to do so. Completion of probation should be excused where it is the fault of the employer and not the veteran that the probation was not completed in accordance with the terms of the collective bargaining agreement.

As seen, plaintiff should be viewed as having held an "other than temporary position" as early as the layoff date of December 18, 1970. Therefore, under 38 U.S.C. § 2024(d) and (e), plaintiff had to be credited with the four days he missed due to the pre-induction physicals. Were plaintiff credited with the four days, he would have been deemed non-probationary and would not have been laid off until February 28, 1971. It is irrelevant that the defendant may have laid him off in good faith Cf. *O'Mara v. Petersen Sand & Gravel Co.*, 488 F.2d 896, 898 (7th Cir. 1974). But for the pre-induction physicals, plaintiff would have collected his salary until February 28, 1971, and would have been reinstated upon return from active duty with a September 14, 1970, date with all attendant rights under the collective bargaining agreement. Thus under the Act plaintiff is entitled to reinstatement with a September 14, 1970, seniority date and to collect lost wages from December

18, 1970, until at least February 28, 1971, his proper layoff date.[2] 38 U.S.C. § 2022; *United States* ex rel. *Adams v. General Motors Corp., supra.* Plaintiff did not waive his rights under the Act by his April 24, 1973, refusal to continue in the inferior status accorded him by the defendant. *O'Mara v. Petersen Sand & Gravel Co.*, 498 F.2d 896 (7th Cir. 1974).

Accordingly, the district court's judgment is reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[2]He will also be entitled to recover lost wages from April 24, 1973, when he left defendant's employ, to date unless on remand defendant can show that plaintiff abandoned his willingness to continue in its employ under the conditions mandated by the Act when he enrolled in the University of Wisconsin-Parkside in September 1973 as a student seeking a degree. See *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267-268 (10th Cir. 1975).

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

SAMUEL C. HANNA,

Plaintiff,

vs.

CIVIL ACTION
FILE NO. 75-C-27

AMERICAN MOTORS
CORPORATION,

Defendant.

ORDER

This case came before the Court on motion of plaintiff for partial summary judgment, with briefs in support of and in opposition to such motion and with oral argument. During the course of the oral argument defendant moved orally for summary judgment as to the first count of the complaint. The Court, having reviewed the briefs and considered the oral arguments, found as to the first count of the complaint that there are no genuine issues as to any material fact and that defendant is entitled to judgment as a matter of law, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Upon being advised of such finding, plaintiff indicated he would acquiesce in a motion to dismiss the second count of the complaint, and defendant then made such motion. On the basis of the foregoing.

IT IS ORDERED that plaintiff's motion for partial summary judgment is denied, and

IT IS FURTHER ORDERED that defendant's oral motion for summary judgment as to the first count of the complaint is granted, and

IT IS FURTHER ORDERED that defendant's oral motion to dismiss or in the alternative for summary judgment as to the second count of the complaint is granted, and

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the action is dismissed with prejudice in its entirety.

Dated: [May 19], 19[76].

/s/ [Robert W. Warren]
Honorable Robert W. Warren
United States District Judge